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IN THE
COURT OF APPEALS OF INDIANA

JOSEPH M. HRSTICH and SANDRA L. HRSTICH,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 45A05-0607-CV-407
CITY OF EAST CHICAGO,	)	
Appellee-Defendant.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable John R. Pera, Judge
Cause No. 45D10-0510-PL-119

February 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellants-Plaintiffs Joseph M. & Sandra L. Hrstich ("the Hrstichs") appeal the denial of their request for summary judgment in their action against Appellee-Defendant City of East Chicago ("the City") arising from an alleged violation of the Access to Public Records Act, Indiana Code Section 5-14-3-1, et seq. ("APRA"). We affirm.

Issue

The Hrstichs present three issues, which we consolidate and restate as a single issue: whether the trial court erroneously concluded that the City, as opposed to the Hrstichs, was entitled to judgment as a matter of law.

Facts and Procedural History

The relevant facts are not in dispute. The Hrstichs, residents of Chicago, Illinois, own property located at 4621 Magoun Avenue, East Chicago, Indiana (a/k/a 818-822 W. Chicago Avenue, East Chicago, Indiana). On June 23, 2005, the City of East Chicago Building Department ("the Building Department") hand delivered and mailed to the Hrstichs a Notice of Hearing and Proposed Order to Repair.

The Hrstichs verbally requested, and apparently were denied, public records from the City. On August 9, 2005, they retained David Austgen ("Austgen") to represent them. On August 17, 2005, Austgen hand delivered to the City a written request for documents pertaining to 4621 Magoun Avenue. The request was directed to the attention of the Building Inspections and Permits Administrator, the Health Department Administrator, the City Clerk and the Corporation Counsel. The letter stated in pertinent part:

> According to I.C. § 5-14-3 et seq., you have twenty-four (24) hours to respond to this request. If you choose to deny the request, then you are required to respond in writing and state the statutory exception authorizing the withholding of all or part of the public record and the name and title or position of the person responsible for the denial.

(App. 20.) Corporation Counsel Nathaniel Ruff ("Ruff") telephoned Austgen on August 18 and August 19, 2005. Ruff indicated that the records would be produced, despite the lack of a written response. On August 22, 2005, Ruff directed Austgen to contact Alexander Lopez ("Lopez"), the attorney for the Building Inspections Department. Lopez indicated that the documents and a written response were forthcoming.

On August 23, 2005, the Hrstichs filed Formal Complaint 05-FC-176 with Karen Davis ("Davis"), the Public Access Counselor of Indiana. The Complaint alleged a violation of APRA because the August 17, 2005 written request had resulted in neither production of the requested records or a written response.[1] Davis requested the City's response on or before September 7, 2005.

On August 24, 2005, Lopez issued a facsimile letter to Austgen, "[to] confirm that the records requested from the East Chicago Building Department will be ready on August 24, 2005 after 1:00 p.m." (App. 23.) Austgen's clerk arrived at the Building Department on Thursday, August 25, 2005 shortly after 1:00 p.m., apparently expecting to pick up the documents. However, the documents were merely ready for inspection and were not copied. The Building Department clerk indicated that copying of the approximately 330 pages could

[1] When seeking an advisory opinion from the Public Access Counselor, the Hrstichs alleged that their August 17, 2005 request was denied but did not challenge the apparent denial of the August 3, 2005 verbal request. Pursuant to Indiana Code Section 5-14-3-9(g), a plaintiff is generally not eligible for an award of attorney fees if the plaintiff filed the action without first seeking and receiving an informal inquiry response or advisory

be completed by the following Monday. Later during the same day of August 25, 2005, the Hrstichs filed a Supplemental Formal Complaint with the Public Access Counselor, alleging a continued denial of public records.

The Building Department clerk had the documents copied as of Monday, August 29, 2005. Austgen's clerk picked up the documents (consisting of 275 pages) on August 30, 2005, upon paying a nominal copying fee. On August 30, 2005, Austgen wrote to Lopez to inquire "as to the status of the fifty-five (55) missing pages of documents." (App. 28.) On September 14, 2005, Austgen wrote to Ruff "to inquire about the status of the remainder of our public records request." (App. 94.) Austgen noted that the request had been specifically directed to the Building Department, Corporation Counsel, Health Department and City Clerk yet the latter departments had not issued a specific response.

On September 20, 2005, Ruff advised Davis in writing as follows: "Enclosed are the documents for Mr. Austgen. This is the City's complete file on the building." (App. 39.) On September 21, 2005, Davis issued an advisory opinion that the City violated APRA by failing to timely provide a written response to the August 17, 2005 written request for documents. Davis further opined, "If the City is not providing you with records that are named in your request because it does not maintain those records it should so state." (App. 36.)

On September 26, 2005, Austgen wrote to Ruff demanding that the City pay attorney fees of $6,021.50. Austgen also reiterated that the Health Department and City Clerk had not directly responded to the documents request.

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opinion from the Public Access Counselor.

On October 12, 2005, the Hrstichs filed a complaint in the Lake Superior Court alleging a violation of APRA and seeking reasonable attorney fees. The City filed an Answer on November 17, 2005. On January 13, 2006, the Hrstichs moved for summary judgment. On March 13, 2006, the City responded and filed a cross-motion for summary judgment. The response and cross-motion were stricken as untimely.

On June 30, 2006, the trial court denied the Hrstichs' motion for summary judgment and further ordered "as a matter of law they shall take nothing by way of their Complaint."[2] (App. 6.) The Hrstichs appeal.

Discussion and Decision

A. Summary Judgment Standard of Review

Pursuant to Rule 56(C) of the Indiana Rules of Trial Procedure, summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Our standard of review is the same as that of the trial court when reviewing a grant of summary judgment. Shambaugh & Son, Inc. v. Carlisle, 763 N.E.2d 459, 461 (Ind. 2002). We consider only those facts that the parties designated to the trial court. Id.

Questions of law are reviewed de novo. Bader v. Johnson, 732 N.E.2d 1212, 1216 (Ind. 2000). The interpretation of a statute is a question of law reserved for the courts. Heaton & Eadie Prof. Serv. v. CCI, 841 N.E.2d 1181, 1186 (Ind. Ct. App. 2006). In construing a statute, "it is the duty of the Court to determine and to give effect to the true

[2] Despite the language of the trial court's summary judgment order, we would be remiss if we failed to observe that no trial on the merits has been conducted.

intent of the legislature." Post Tribune v. Police Dept. of the City of Gary, 643 N.E.2d 307, 308 (Ind. 1994).

B. Analysis

The Hrstichs contend that the trial court misconstrued APRA when it found that (1) the City did not deny the Hrstichs' request; (2) the City was not required to provide a written response because it orally agreed to produce the records; and (3) because there was no violation, the City owed no attorney fees. The Hrstichs argue that their written request was deemed denied when twenty-four hours passed without a written response. Moreover, when the documents were produced there were apparent omissions.

Indiana Code Section 5-14-3-1 provides in relevant part:

> It is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. . . . This chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.

In furtherance of this public policy, Indiana Code Section 5-14-3-3(a) provides in relevant part: "Any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of this chapter." Additionally, Indiana Code Section 5-14-3-9(a) provides in relevant part:

> (a) A denial of disclosure by a public agency occurs when the person making the request is physically present in the office of the agency, makes the request by telephone, or requests enhanced access to a document and:

(1) the person designated by the public agency as being responsible for public records release decisions refuses to permit inspection and copying of a public record when a request has been made; or
(2) twenty-four (24) hours elapse after any employee of the public agency refuses to permit inspection and copying of a public record when a request has been made;
whichever occurs first. . . .

(c) If a request is made orally, either in person or by telephone, a public agency may deny the request orally. However, if a request initially is made in writing, by facsimile, or through enhanced access, or if an oral request that has been denied is renewed in writing or by facsimile, a public agency may deny the request if:

(1) the denial is in writing or by facsimile; and
(2) the denial includes:
(A) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and
(B) the name and the title or position of the person responsible for the denial.

Indiana Code Section 5-14-3-9(i) provides:

In any action filed under this section, a court shall award reasonable attorney's fees, court costs, and other reasonable expenses of litigation to the prevailing party if:

(1) the plaintiff substantially prevails; or
(2) the defendant substantially prevails and the court finds the action was frivolous or vexatious.

As previously observed, we must give effect to the intent of the legislature. Post Tribune, 643 N.E.2d at 308. The expressly stated objective of APRA is liberal disclosure to requesting members of the public. See I.C. § 5-14-3-1. In furtherance of this objective, attorney fees may be awarded if APRA is violated by the wrongful denial of document disclosure, and the requestor must coerce compliance. See City of Elkhart v. Agenda: Open Govt., 683 N.E.2d 622, 628 (Ind. Ct. App. 1997), trans. denied.

Here, the Hrstichs were promptly provided a large quantity of documents (275 pages) at a minimal cost. In the twelve-day interim, they were repeatedly advised that the City was not challenging their right to the documents and intended to provide them. Moreover, the City had sent a written response (by facsimile) to the Hrstichs' attorney on August 24, 2005. Clearly the overall objective of APRA was satisfied and the Hrstichs did not suffer an actual denial of documents due them.[3] Thus, the Hrstichs have not established that they incurred attorney fees to coerce the tender of documents. The trial court properly found that they did not establish their entitlement to judgment as a matter of law.

Affirmed.

VAIDIK, J., and BARNES, J., concur.

[3] The Hrstichs argue that they were entitled to separate responses from the Health Department and the City Clerk. However, the designated materials indicate that the Building Department was responsible for maintaining the entire file and the City retains no additional undisclosed records pertinent to 4621 Magoun Avenue.